IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 479 OF 1986

1. Jayantilal Dharsi Vikamsi, 45 yrs.
   Occu : Business

2. Smt. Maniben Pragji Rav Jiyani, 58 yrs.

3. Shri Ajeetbhai Pragji Ravjiyani, 34 yrs.

4. Shri. Hasmukh Pragji Ravjiyani, 29 yrs.
   Nos. 2 to 4 being heirs and legal representatives of Pragji Shivjee Ravjiyani.

   All Agriculturists and Businessmen
   R/o. Tapovan, Panchawati, Nashik .. Appellants/ Original Defendants

V/s.

Seth Doongarsi Nagji Charitable Trust with head office at Bombay, through its trustees :-

1. Shri Madhukant Virji Thakker
   Age-59, Businessman

2. Shri. Mukesh Mahesh Thakker
   Age-37, Businessman

3. Shri Dhiren Ishwarlal Mull,
   Age-58, Businessman

4. Shri Hemraj Pitambar Dawda
   Age-76, Businessman

5. Shri Mahendra Laxmidas Somaiya,
   Age-58, Grain Merchant & Share Broker

6. Shri Arun Liladhar Somaiya,
   Age-58, Businessman

7. Dr. Varsha Dinesh Vadera,
   Age-52, Medical Practitioner

8. Shri Jatin Gopaldas Shah,
   Age-57, Social Worker

9. Ms. Meeta Narrotam Somaiya,
   Age-43, Finance Consultant,

   All having their office at 106/B, Neelam Centre, Hind Cycle Road, Worli, Mumbai-400 025. .. Respondents/ (Orig. Plaintiffs)

Mr. N.V. Walawalkar for the Appellant
Mr. C.J. Sawant with Mr. Vijay Patil i/b. M/s. Kanga & Co. for the Respondent Nos. 1 to 5.

CORAM : ABHAY S. OKA, J.
DATED : 20TH APRIL, 2005

ORAL JUDGMENT :-

1. On 26th August, 1986, this Court admitted Second Appeal by passing the following order:-

> "Heard Shri Abhyankar for the appellants Shri Bhimrao Naik for the Respondents.
>
> Admitted on the following substantial questions of law
>
> (1) Whether in view of S. 88-B(2) of the Bombay Tenancy and Agricultural Lands Act, 1948 Civil Court has jurisdiction to decide the question whether the Plaintiff Trust is an exempted trust?
>
> (2) Whether a Suit by a trust for possession of the tenanted land is barred in the absence of a certificate under S. 88(B)(2) of the B.T. & A.L. Act of 1948?
>
> Notice returnable on 6.10.1986. Shri Naik waives notice.
>
> P.B. dispensed with."

2. I have heard the learned counsel appearing for the parties on the substantial questions of law framed in order dated 26th August, 1986.

3. With a view to appreciate the legal submissions, it will be necessary to refer to the facts of the case in brief. Second Appeal is by the Original Defendants and the Respondent is the Original Plaintiff. The Respondent is a Public Trust duly registered under the

Bombay Public Trusts Act, 1950. (hereinafter referred to as the said Act of 1950.) There is no dispute that the Suit land, which is an agricultural land belongs to the Respondent Trust. Case of the Respondent Trust is that by registered lease dated 17th July, 1964, the Suit land was given on lease in favour of the Appellant No. 1 and one Narottam Jamnadas. The lease was for a period of 10 years. According to the Respondent, the lease was created for the purpose of growing sugar cane, fruits, vegetables and raising crops for the breading the live stock. Contention of the Respondent is that the lease was not for raising foodgrains crop. The Appellant No. 1 formed a partnership Firm with Appellant No. 2 and the said Narottam Jamnadas on 1st April, 1968 for cultivating, growing and selling the grapes. The said Narottam Jamnadas retired from the said partnership with effect from 1st February, 1971. The case of the Respondent is that as the lease period was only upto 31st May, 1974, the Respondent on 29th May, 1974 called upon the Appellants to surrender the Suit land to the Respondents on 31st May, 1974. As the Appellants did not comply with the said notice, Suit came to be filed by the Respondent. The Suit was resisted by the Appellant by filing Written Statement. One of the main contention raised in the Written Statement was that in absence of the certificate as contemplated under Section 88B(2) of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Tenancy Act), the Suit filed by the above Defendant for the possession was

not maintainable. It is stated that the Suit was barred by Section 85 of the Tenancy Act.

4. The Trial Court framed various issues. One of the issue framed was whether the Appellants were protected under the provisions of the Tenancy Act. Issue as to the jurisdiction of the Civil Court was also framed by the learned Trial Judge. The Trial Judge decreed the Suit and directed the Appellants to hand over the possession of the Suit land to the Respondents. The Appeal preferred by the Appellants to the District Court has been dismissed.

5. Shri Walawalkar, appearing for the Appellants submitted that in absence of certificate issued under Section 88B (2) of the Tenancy Act, the Respondent could not have claimed exemption from applicability of certain provisions of the Tenancy act. He submitted that in view of the provisions of Section 85 of the Tenancy Act, read with Sub Section 2 of Section 88(B) of the Tenancy Act, the issue whether the Respondent Trust was entitled to exemption under Sub Section (1) of Section 88(B) could have been decided only by the Collector and the jurisdiction of the Civil Court was ousted. He invited my attention to Section 85A of the Tenancy Act and stated that the issue whether the exemption is available or not ought to have been referred by the Trial Court to the Collector. He invited my attention to relevant portion of the judgment of the learned Single Judge

reported in **AIR 1980 BOMBAY 148 (Jagdeorao Anandrao Pawar v. Kisan Namdeo Pawar and another)**. He submitted that the said judgment does not lay down a preposition of law that in absence of a Certificate under Sub Section 2 of Section 88B, even a Civil Court can adjudicate upon the issue of entitlement of a public trust to exemption under section 88B of the Tenancy Act. He submitted that passing observations are made by the learned Single Judge in the said case on the said issue. He pointed out that the said decision of the learned Single Judge has been overruled by a decision of the Division Bench of this Court reported in **1990 Mh.L.J. 1183 (Keraba Dattu Borachate and others v. Shri Sheshashai and Vishnu Trust)**. He submitted that Sub Section 2 of Section 88B clearly gives an indication that the issue regarding the entitlement to exemption is required to be decided by the Collector under the provisions of the Tenancy Act.

6. Shri Walawalkar invited my attention to the provisions of Section 4-B of the Tenancy Act and submitted that even assuming that the Respondent Trust was entitled to exemption under Section 88B of the Tenancy Act, Section 4B will govern the relationship between the parties as the Respondent had filed Suit against the Appellants on the ground that the Tenancy is terminated by the influx of time. He submitted that though no substantial question of law is framed on this aspect since the said question arises in the Appeal,

this Court should exercise discretion under proviso to Sub-Section 5 of Section 100 of the Code of Civil Procedure, 1908 and frame an additional substantial question of law. In this respect, he submitted that in view of the mandate of section 4B of the Tenancy Act, the tenancy of the Appellants could not have been determined only on the ground that the period fixed by the agreement of the lease have expired. Shri Walawalkar appearing for the Appellant state that the Appellant No. 1 has expired. I found that legal representatives of Appellant No. 1 are not brought on record.

7. Shri C.J. Sawant, the learned Senior Counsel appearing for the Respondent submitted that on plain reading of the provisions of Tenancy Act, it is clear that exclusive jurisdiction to consider the case for exemption under section 88B of the Tenancy Act is not vested with the Collector. He submitted that Sub Section 2 of Section 88B merely indicates a rule of evidence and if in a given case a certificate granted by the Collector after holding an enquiry is produced, the same shall be conclusive evidence of the fact that the Trust is exempted from the applicability of the provisions of the Tenancy Act under section 88B. He submitted that even if the Suit is filed in absence of such certificate and if a case is made out by the Trust regarding the eligibility to exemption under section 88B of the Tenancy Act, the Civil Court has jurisdiction to

decide the question of eligibility for exemption. He submitted that this is the ratio of the decision of the learned Single Judge in **Jagdeorao's case (supra)**. He has placed reliance on another decision of learned single Judge of this Court reported in **1992 (Supp.) Bom. C.R. 558 (Poulad Deochand Patil v. Samasta Aher Nhavi Panch Trust & another)** and submitted that the legal position is no longer res integra. He submitted that the decision in **Jagdeorao's case** is not overruled in the decision of **Keraba's case (supra)** and the decision in Jagdeorao is overruled only on one aspect regarding the applicability of principles of natural justice to the enquiry under Sub Section 2 of Section 88B. He submitted that the contention based on Section 4B of the Tenancy Act cannot be allowed to be raised as no substantial question of law is framed. Second Appeal is filed in 1986 and at this stage, prayer can not be made for framing additional question of law. He submitted that the said contention was not specifically raised in the First Appellate Court.

8. I have considered rival submissions. Section 88 of the Tenancy Act reads thus:-

> **"88B. Exemption or certain provisions to land of local authorities, universities and trusts.**- Nothing in foregoing provisions except sections 3, 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and the provisions of Chapters VI and VIII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above shall apply,
>
> (a) to lands held or leased by a local authority, or University established by law in the [Bombay

area of the State of Maharashtra]; and

(b) to lands which are the property of a trust for an educational purpose, [a hospital, Panjarapole, Gaushala] or an institution for public religious worship;

Provided that, -

(i) such trust is or is deemed to be registered under the Bombay Public Trusts Act, 1950 and

(ii) the entire income of such lands is appropriated for the purposes of such trust;

[(c) to lands assigned or donated by any person before the 1st day of August 1956 for the purpose of rendering any of the following services useful to the community, namely:-

maintenance of water works, lighting or filling of water troughs for cattle;]

[(d) to lands taken under management temporarily by the Civil, Revenue or Criminal Courts by themselves, or through receivers appointed by them, till the decision of the title of rightful holders:

Provided that, from the date on which the land referred to in clause (d) is released from management, all the foregoing provisions of this Act shall apply thereto; but subject to the notifications that in the case of a tenancy, not being a permanent tenancy, which on that date subsists in the land,

(i) the landlord shall be entitled to terminate the tenancy under section 31 (or under section 33B in the case of a certified landlord) within one year from such date; and

(ii) within one year from the expiry of the period during which the landlord or certificated landlord is entitled to terminate the tenancy as aforesaid, the tenant shall have the right to purchase the land under section 32 (or under section 33-C in the case of an excluded tenant and

(iii) the provisions of sections 31 to 31-D, (both inclusive) (or sections 33-A and 33-B ion the case of a certificated landlord and sections 32 to 32-R, (both inclusive) for sections 33A and 33-C in the case of an excluded tenant) shall, so far as may be applicable, apply to the termination of a tenancy or the right to purchase the land, as aforesaid:

Provided further that,-

(a) in the case of a permanent tenancy the permanent tenant shall be entitled to purchase the land held by him on permanent tenancy,

(i) within one year from the date on which the estate or land is released from management, or

(ii) where such estate or land was released from management after the Tillers' day but before the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1960, within one year from such commencement, and

(b) where such permanent tenant is desirous of exercising the right conferred on him under this proviso, he shall accordingly inform the landlord and Tribunal in the prescribed manner within the said period of one year and the provisions of sections 32 to 32-R shall, so far as may be applicable, apply to the right of the permanent tenant to purchase the land.]

[(2) For the purposes of this section, a certificate granted by the Collector, after holding an enquiry, that the conditions in the proviso to sub-section (1) are satisfied by any trust shall be conclusive evidence in that behalf.]"

Sub section 2 provides that a certificate granted by the Collector after holding an enquiry that the conditions in the proviso to sub Section (1) are satisfied by any trust shall be conclusive evidence in that behalf. On plain reading of Sub Section 2 of Section 88B, it is a rule of evidence by which the certificate issued by the Collector is made conclusive.

9. The learned Senior Counsel appearing for the Respondent has invited my attention to provisions of Section 88C of the Tenancy Act, which deals with exemption from applicability from certain provisions of

Tenancy Act to certain categories of persons. Section 88C reads thus:-

> **"88C. Exemption from certain provisions to lands leased by persons with the annual income not exceeding Rs. 1,500.** -- (1) [Save as otherwise provided by sections 33-A, 33-B and 33-C nothing in sections] 32 to 32-R (both inclusive) shall apply to lands leased by any person if such land does not exceed an economic holding and the total annual income of person including the rent of such land does not exceed Rs. 1,500 :
>
> . Provided that the provisions of this sub-section shall not apply to any person who holds such lands as a permanent tenant or who has leased such land on permanent tenancy to any other person.
>
> [(2) Every person eligible to the exemption provided in sub-section (1) shall make an application in the prescribed form to the Mamlatdar within whose jurisdiction all or most of the pieces of land leased by him are situate within the prescribed period of a certificate that he is entitled to such exemption.
>
> (3) On receipt of such application, the Mamlatdar shall, after giving notice to the tenant or tenants of the land, hold inquiry and decide whether the land leased by such person is exempt under sub-section (1) from the provisions of section 32 to 32-R.
>
> (4) If the Mamlatdar decides that the land is so exempt, he shall issue a certificate in the prescribed form to such person.
>
> (5) The decision of the Mamlatdar under sub-section (3), subject to appeal to the Collector, shall be final.]"

From the Sub section 2 of the Section 88C, it is apparent that in the case of Section 88C, the legislature intended that every person, who is claiming exemption provided in sub-section (1), must make an application in the prescribed form to the Tahsildar within whose jurisdiction all or most of the pieces of land leased by him are situate. Sub Section 3 provides

that the Tahsildar after giving notice to the tenant shall hold an enquiry. Thus, whenever Legislature intended, a specific provision has been made, laying down the procedure for making an application. Section 88B does not provide for the same.

10. Shri Walawalkar, the learned counsel appearing for the Appellants has placed reliance on the relevant rules framed under the Tenancy Act. Placing reliance on the relevant rules, he has submitted that an elaborate procedure is prescribed by the rules which governs the enquiry to be conducted by the Collector before granting certificate under sub-section 2 of Section 88B. He submitted that considering the provisions of rules, the said Collector is obviously required to exercise quasi judicial powers. He submitted that apart from Section 85 and 85-A of the Tenancy Act, as a provision is made for holding quasi judicial inquiry, the jurisdiction of the Civil Court in that behalf is excluded by necessary implication.

11. In the decision in the case of **Jagdeorao's case (Supra),** the learned Single Judge held :-

> "It is an inquiry for the purpose of entitlement to acquire a piece of conclusive evidence on certain matters, on the proof of which the statutory exemption under sub-section (1) of Section 88-B is available. **It is not as if that when the certificate is not available, exemption is not available under sub-section (1). It is when its entitlement is in issue between the parties that the party claiming the exemption has to show that it satisfies the conditions laid down by sub-sec. (1). The certification proceeding under sub-section (2)**

> **is merely an aid for the purpose of acquiring conclusive proof with regard to the conditions enacted by sub-section (1).** therefore, the word "inquiry" in sub-section (2) cannot be treated as equivalent to any judicial trial which must necessarily end by rendering a decision or making an order. By the very nature of things, in the matters of the trust, the conditions being that the trust is or deemed to be registered under the Bombay Public Trusts Act and the entire income of lands is appropriated for the purposes of the trust, no lis arises between any parties nor any adjudication as such is called for. Once the Collector is satisfied that these conditions exist, then he is enabled to issue the certificate, which is treated as conclusive evidence." (Emphasis supplied)

12. There is some substance in the submission made by the learned counsel appearing for the Appellant, Shri Walalwalkar, that this issue did not specifically arise before the learned Single Judge and the only issue which arose was whether remedy under section 76 of the Tenancy Act was available in the matter of grant of certificate under section 88B of the Tenancy Act. He submitted that ratio of the said judgment is the answer given to the only question which arose for consideration before the learned Single Judge. The learned Single Judge held that inquiry contemplated under Sub Section 2 of Section 88 B is not a judicial inquiry and no lis arises before the Collector. It was held that no adjudication is called for before issuing a certificate. It was, therefore, held that remedy under Section 76 of the said Act of 1948 is not available against the certificate.

13. Perusal of the decision of the Division Bench in the case of **Keraba Dattu's case** (Supra) shows that the decision of the learned Single Judge is overruled only

on one point. The Division Bench has held that before holding an enquiry under section 88B, principles of natural justice must be complied with and notice is required to be served by the Collector on the tenants.

14. However, the submission made by Shri Walawalkar is comprehensively answered by another decision of the learned Single Judge in the case of **Poulad Deochand's case (Supra)**. Paragraph 7 of the said decision reads thus:-

> "7. **It is not a condition of exemption available to a public trust under section 88-B of the Tenancy Act that it must necessarily possess the certificate issued by the Collector under sub-section (2) of section 88-B.** The statute provides that if the prescribed conditions are objectively satisfied by the trust, the land in question shall be treated as exempted from prescribed provisions of the Act notwithstanding the fact that the holder of the land may not possess the certificate of exemption. **If the trust produces the certificate issued under sub-section (2) of section 88-B of the Tenancy Act before the Civil Court or any other authority, production of such certificate by itself is liable to be considered as conclusive evidence of the fact that the trust has duly satisfied the prescribed conditions of exemption. If no such certificate is produced by the Plaintiff-trust in the Civil Suit, the Civil Court is not precluded in law from considering the question as to whether the trust satisfied the requisite conditions or not for exemption.** In such a case, the trust cannot avail of the presumptive rule of evidence." (Emphasis supplied)

15. Being a decision of Single Judge of this Court, I am bound by the aforesaid ratio laid down by the Single Judge in the case of **Poulad Deochand's case.**

16. If the ratio of the decision by the learned Single Judge in the above case is considered, it is apparent

that what is incorporated by Sub Section 2 of Section 88 is merely a rule of evidence. On plain reading of Section 88B, it cannot be said that the issue regarding the eligibility to exemption is required to be decided only by the Collector. There is nothing to show that exclusive jurisdiction is conferred on the Collector to decide the issue of the eligibility. Section 85 will come into operation only if under the provisions of Tenancy Act, the issue regarding the eligibility is required to be decided only by the Collector. If in a given case Trust produces a certificate issued by the Collector, the same will be conclusive evidence of entitlement to exemption. However, in absence of such certificate, the Civil Court will not be precluded from going into the question of eligibility to exemption under sub section 1 of section 88B as the bar created by Section 85 will not apply.

17. It is obvious that the Suit filed by the Respondent Trust for possession is not barred, merely because a certificate under sub section 2 of Section 88(B) is not produced. This answers both the substantial questions of law framed by this Court in favour of the Respondent.

18. The Suit was filed in the year 1974. The Appeal was filed in the First Appellate Court in the year 1983. Perusal of the judgment of the Appellate Court shows that a specific contention based on section 4(B) of the Tenancy Act is not urged. Paragraph no. 11 of the said

decision indicates that Section 4(B) was pressed into service only in the context of controversy of requirement of service of notice. The Appellate Court relied upon the decision of the Apex Court in **Maneksha's case AIR 1974 SC 2123** and negatived the said contention. It is pertinent to note that even in the memorandum of Second Appeal, the said contention which is canvassed by Shri Walawalkar is not specifically raised. The points for determination framed by the Appellate Court indicate that the said contention was not raised in the form in which Shri Walawalkar wants the substantial question of law to be framed at this stage. The Second Appeal is of the year 1986. When this question is not specifically raised in the memorandum of Appeal, this is not a case where the power under the proviso to sub section 5 of section 100 should be exercised 19 years after Second Appeal was filed. Therefore, Shri Walawalkar's contention that additional substantial questions of law be framed cannot be considered. It cannot be disputed that the Second Appeal under section 100 of Code will have to be heard and decided only on the substantial questions of law, which are framed by this Court.

19. In view of the foregoing discussion, there is no merit in this Appeal. The same is dismissed with no order as to costs. At this stage, Shri Walawalkar prays that interim order, which was operating during the pendency of the Appeal, be continued for a period of 12 weeks. The said prayer is opposed by the learned Senior

Counsel appearing for the Respondents.

20. Considering the enormous pressure on the Court Stenographers, it will not be possible to make available to the parties a copy of the judgment in a reasonable time. As interim order is operating for such a long time, the same shall be continued for a period of 12 weeks from today. It is obvious that the conditions imposed at the time of granting of interim order will continue to apply for a period of 12 weeks.

(JUDGE)